5-3100-7392-2; 5-3100-7483-2
5-3100-7492-2; 5-3100-7493-2
5-3100-7494-2; 5-3100-7655-2

STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

In the Matter of Certain Petitions for Relief Under the Veterans Preference Act: Donald R. Tonnell, Scott R. Salzman, Gary L. Johnson, Thomas M. Vescio, Paul C. Eskew and Rocky P. Reynolds,

Petitioners,

v.

City of Minneapolis,

Respondent.

RECOMMENDED
FINAL ORDER UPON REMAND

WHEREAS: the petitioning veterans herein filed their Petitions objecting to employment decisions of Respondent in the winter of 1992; and,

WHEREAS: Respondent's Motion for Summary Disposition of the Petitions was Denied on November 8, 1993; and,

WHEREAS: Petitioners' subsequent Motions for Summary Disposition of Respondent's Objections were granted on July 27, 1994; and,

WHEREAS: The parties subsequently filed letters with the Commissioner disagreeing over proper interpretation of the recommended order, causing him to remand the cases for further consideration and clarification;

NOW, THEREFORE, IT IS HEREBY RECOMMENDED: that the Commissioner of Veterans Affairs issue the following:

ORDER

NOW, THEREFORE, under the authority granted by Minn. Stat. § 197.481, IT IS ORDERED: that the City of Minneapolis:

1. Award each of the Petitioners backpay for the period of time that he was unemployed beginning with the commencement of Respondent's winter work season on December 1, 1992 and ending with the date he received a winter work assignment, with interest at 6% per annum, (pursuant to Minn. Stat. § 334.01, calculated from the time each paycheck was due) subject to deductions for any unemployment compensation and earnings from other employment he may have received for that period, within 30 days of the date of this Order; and

2. Restore any sick leave, vacation pay and other benefits each Petitioner would have received if he had continued to be actively employed during said periods; and

3. Pay each Petitioner nominal damages of $300 within 30 days of the date of this Order; and

4. Henceforth provide explicit individualized notice to each senior veteran it intends to remove, in accord with Minn. Stat. § 197.46, whenever the City intends to assign work at the commencement of any work season to any employee with less seniority prior to assigning work to a more senior veteran.

Dated this 17th day of March, 1995

/s/ Howard L. Kaibel, Jr.
HOWARD L. KAIBEL, JR.
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

Backpay

The Respondent (City of Minneapolis) correctly interpreted the previous proposed order herein as requiring eligibility for backpay to commence on December 1, 1992, the beginning of the winter work season. There has been no dispute throughout the consideration of this matter of the effective date of the removal of these veterans from their jobs without the statutorily required hearing. The violations of the law occurred on December 1, 1992, when less senior nonveterans were recalled from layoff for winter work assignments, while the more senior veteran petitioners were not. As the Minnesota Supreme Court put it in Young v. Duluth, 386 N.W.2d 732 (Minn. 1986) at 738:

> If the City merely reassigned [the veteran's] duties to non-veteran employees less senior than he, his position was not abolished in good faith and he is entitled to reinstatement with backpay.

In short, the assignment of the veterans' work to the less senior nonveterans did not happen until December 1, 1992. That's when there was a protected "removal" under the statute, which is the starting date for computation of backpay.

Both Petitioners and Respondent understood that employees would be laid off at the end of the summer work season whenever the particular project they were working on was completed. All understood that this would mean that some more senior veterans might be laid off while some less senior nonveterans were still completing their assigned projects. Petitioners' made it clear from the outset that they did not object to this practice.

Petitioners' Tonnell and Vescio explicitly said so in their letter to the Administrative Law Judge of March 8, 1993:

> According to the winter work list we understand that senior employees could be laid off while employees with less time would be working. Then on December 1, 1992 reassignment according to seniority was to take place. We would have no reason to file an appeal before the December 1 date.

A copy of this letter was subsequently mailed by the Administrative Law Judge to Respondent's representative and to all of the Petitioners. It was referenced and enclosed in a March 16 letter to all parties updating them on the status of the proceeding. Indeed, Petitioners' counsel relied on this interpretation in her brief objecting to Respondent's Motion for Summary Dismissal. She contended that the notice Petitioners received on October 2, 1992 of their Veterans Preference Act (VPA) rights to appeal removal within sixty days did not prevent them from petitioning in January, because they were not effectively removed and had no knowledge of that removal until the less senior nonveterans were recalled in December. They cannot consequently now be allowed to collect backpay for days prior to December 1, by contending that they were effectively "removed" earlier. The attached revised proposed order should adequately clarify this for all concerned.

Nominal Damages

Upon further reconsideration of the Order previously recommended, it is clear that there was an inadvertent mistake which should be corrected regarding the amount of nominal damages due the Petitioners. The $100 previously proposed should be increased to $300.

Nominal damages are given, not as an equivalent for the wrong, but in recognition of a technical injury and by way of declaring a right or as a basis for taxing costs; and are not the same as damages small in amount. 25 C.J.S. Damages § 8; Danker v. Iowa Power and Light Company, 249 Ia. 327, 86 N.W.2d 835 (1957).

An amount as low as $100 was once considered an appropriate minimal nominal amount. However, a review of modern authority discloses that $300 is a more appropriate minimum "in today's world." (Judge Mihalchick in Bruun v. Crow Wing County; OAH 69-3100-5788-2, September 25, 1991.) A review of nominal damages in VPA cases over the last five years indicates that $300 has become the modern minimum: Sequin v. Duluth, 4-3100-

5786-2, October 23, 1991; Grande v. Minneapolis, 4-3100-6579-2, July 31, 1992; and Hansen v. Blue Earth County, 5-3100-6349-2, February 25, 1993.

Under appropriate circumstances, nominal damages as high as $1,000 have been awarded by judges and the Commissioner in VPA cases. (Ojala v. St. Louis County, Finance and Commerce Vol. 107, No. 233, September 30, 1994—Appeals Court No. C6-94-501.) The circumstances of this case would arguably make $400 an appropriate nominal damage award from this Respondent to each of the Petitioners. The Petitioners are seasonal laborers who have been forced to hire counsel and go to extraordinary lengths to resist Respondent's dismissal motion and to otherwise vindicate their rights over the last 2½ years. The extensive litigation was necessary because the Respondent rejected an initial determination of the Commissioner that the City practices violated the veterans' legal rights, refusing to recognize those rights short of being ordered to do so.

This is not the first time that this Respondent has forced veterans to pursue extensive litigation to vindicate their rights despite an initial determination of the Commissioner that its practices violated the Act. In the Grande case, cited above, Judge Erickson rejected petitioner's plea for attorney fees and substantial exemplary damages to force Respondent to be more attentive to veterans rights, assessing only minimal, nominal damages of $300. The judge nonetheless criticized what he denominated as Respondent's apparent "predilection. . . to follow its past practices rather than recent binding employment decisions by the Commissioner." He pointedly called "to the attention of the City, and its officers and employees" the provisions of Minn. Stat. § 197.46 which make willful violation of the VPA by public officials a crime.

Based on the record herein, the Commissioner could doubtless order greater nominal damages of $400 or more. Some minimal upward departure from what has become the modern minimal standard for nominal damages is arguably appropriately called for herein. Considering all of the circumstances of this case, $300 would consequently certainly be a reasonable and prudent, albeit arguably somewhat conservative, exercise of the Commissioner's considerable discretion to assess such damages.

HLK